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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

GULSTAN E. SILVA, JR., as Personal Representative of the Estate of Sheldon Paul Haleck, Plaintiff, vs. CHRISTOPHER CHUNG; SAMANTHA CRITCHLOW; and STEPHEN KARDASH, Defendants.	CIVIL No. 15-00436 HG/KJM **MEMORANDUM IN SUPPORT; DECLARATION OF ERIC A. SEITZ; EXHIBITS 1-7**

MEMORANDUM IN SUPPORT

Plaintiff GULSTAN E. SILVA, JR., as Personal Representative of the Estate of Sheldon Paul Haleck ("Plaintiff") is entitled to judgment as a matter of law based upon the clear weight of the evidence presented at trial that comports with the applicable standards relied upon by the Ninth Circuit and the material facts that were identified and remain unchallenged from the decision in *Silva v. Chung*, 740 Fed.Appx. 883 (9th Cir. 2018). In the alternative, Plaintiff is entitled to a new trial before a different judge because of the cumulative prejudicial errors that permeated the trial and prevented Plaintiff from fully and fairly presenting his case.

I. RELEVANT PROCEDURAL HISTORY

On March 10, 2017, Plaintiff filed his Second Amended Complaint for Damages that asserted the claims[1] that were tried before the jury selected in this case. Dkt. No. 189. Relevant to this motion are Plaintiff's Fourth Amendment claims against Defendant Officers CHRISTOPHER CHUNG, SAMANTHA CRITCHLOW, and STEPHEN KARDASH (collectively "Defendant Officers") for their use of excessive force in detaining and seizing Sheldon Paul Haleck ("Sheldon").

On June 28, 2017, the District Court issued its "Order…Granting in Part, and Denying, in Part, [Defendant Officers'] Amended Motion for Summary Judgment." Dkt. No. 224. On July 10, 2017, Defendant Officers appealed the District Court's Order denying their Motion for Summary Judgment based on qualified immunity. Dkt. No. 225. On July 10, 2018, after extensive briefing by the parties, the Ninth Circuit affirmed the District Court's denial of qualified immunity and remanded the case back to the District Court for further proceedings, including trial, that were consistent with the Ninth Circuit's disposition of the

[1] Plaintiff maintained throughout the pretrial phase of this matter and continues to maintain numerous other claims and claims by other dismissed plaintiffs against Defendant Officers, Defendant City and County of Honolulu, and Defendant Louis M. Kealoha. Inasmuch as Plaintiff still maintains that these claims were proper for trial, Plaintiff does not intend to waive his prior arguments and any issues on appeal regarding these claims with the filing of this motion.

interlocutory appeal. Dkt. No. 240; *Silva v. Chung*, 740 Fed.Appx. 883 (9th Cir. 2018).

On May 21, 2019, through June 6, 2019, trial was conducted in this matter, including extensive arguments on numerous motions *in limine*, jury selection, presentation of the evidence from both parties, and closing arguments. Dkt. Nos. 372.

On May 31, 2019, at the close of Defendant Officers' presentation of the evidence, Plaintiff's counsel orally moved for judgment as a matter of law and requested that the issue of punitive damages be put before the jury. Dkt. Nos. 364 & 377. Defendant Officers orally moved for judgment as a matter of law in their favor on the issues of qualified immunity, liability for use of excessive force, causation, and punitive damages. Dkt. No. 377. On June 3, 2019, Plaintiff filed his Memorandum in Support of Oral Motion for Judgment as a Matter of Law. Dkt. No. 366.

On the morning of June 4, 2019, the Court finalized its rulings on jury instructions, the special verdict form, and the use of a demonstrative aid by Plaintiff's counsel during closing arguments. Dkt. No. 368. Thereafter, the Court provided the jury its final instructions and both parties presented their closing arguments to the jury. *Id.* The jury began its deliberations on the afternoon of June 4, 2019, and returned the subsequent two days for deliberations. On June 6,

2019, after two and a half hours of deliberations, the jury's verdict was announced in open court, finding, in relevant part, that Plaintiff did not "prove by a preponderance of the evidence that Defendant Officers used excessive force against Sheldon Paul Haleck." Dkt. Nos. 371-372.

On June 19, 2019, Judgment in a Civil Case was entered by the Court pursuant to the "Special Verdict Form," filed on June 6, 2019, and in favor of Defendant Officers Chung, Critchlow, and Kardash. Dkt. No. 378.

II. STANDARD OF REVIEW

A. Federal Rule of Civil Procedure Rule 50(b)

If, at the close of evidence at trial, a party makes a motion for judgment as a matter of law which is not granted by the Court, that party may renew its request by filing a motion after entry of judgment. Fed. R. Civ. P. 50(b). A renewed motion for judgment as a matter of law is governed by Rule 50(b) and provides, in relevant part that:

> [n]o later than 28 days after the entry of judgment…the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:
>
> (1) allow judgment on the verdict, if the jury returned a verdict;
> (2) order a new trial; or
> (3) direct the entry of judgment as a matter of law.

Rule 50 "allows the trial court to remove cases or issues from the jury's consideration when the facts are sufficiently clear that the law requires a

particular result." *Weisgram v. Marley Co.*, 528 U.S. 440, 448, 120 S.Ct. 1011, 1017 (2000) (internal quotations and citations omitted).

In this jurisdiction, the Ninth Circuit has previously affirmed a district court's granting of judgment notwithstanding the verdict ("JNOV") and reversed a district court's denial of judgment as a matter of law in civil rights cases involving unconstitutional conduct by local law enforcement officers. *See Morgan v. Woessner*, 997 F.2d 1244, 1248 (9th Cir. 1993)(affirming district court's JNOV that reversed jury verdict that found plaintiff had not been unlawfully stopped and detained by police officers at Los Angeles International Airport); and *Arekat v. Donohue*, unpublished, D.C. No. CV-03-00701-BMK (9th Cir., March 13, 2008)(granting plaintiff's appeal of district court's denial of renewed motion for judgment as a matter of law in case where the jury found that police lawfully seized plaintiff).

B. Federal Rule of Civil Procedure Rule 59

The motion to set aside a verdict and grant a new trial or alter or amend is a "'matter of federal procedure, governed by Rule of Civil Procedure 59." *Williams v. Nichols*, 266 F.2d 389, 392 (4th Cir. 1959)(quoting *Aetna Cas. & Sur. Co. v. Yeatts*, 122 F.2d 350, 352 (4th Cir. 1941)). Fed. R. Civ. P. Rule 59(a) permits a court to "grant a new trial on all or some of the issues. . .to any party. . .after a jury trial, for any reason for which a new trial has heretofore been granted

in an action at law in federal court." Fed. R. Civ. P. Rule 59(e) permits the court "to alter or amend a judgment."

In a Rule 59 motion, "it is the duty of the judge to set aside the verdict and grant a new trial, if [s]he is of [the] opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." *Williams*, 266 F.2d at 392-393 (quoting *Aetna Cas. & Sur. Co.*, 122 F.2d at 352). "The **exercise of this power** is not in derogation of the right of trial by jury but **is one of the historic safeguards of that right**." *Id.*, 266 F.2d at 393 (**emphases added**).

C. Federal Rule of Civil Procedure Rule 60

Where a trial court is granted discretion under Rule 59 to determine a motion for a new trial, this same exercise of discretion is similarly afforded to a trial court under Fed. R. Civ. Proc. Rule 60. *Wharf v. Burlington Northern Railroad Co.*, 60 F.3d 631, 637 (9th Cir. 1995). Fed. R. Civ. Proc. Rule 60, "[o]n motion and just terms" allows the trial court to "relieve a party. . .from a final judgment" on the grounds of "fraud…misrepresentation, or misconduct by an opposing party," among other grounds. Fed. R. Civ. P. 60(b); *see also Wharf*, 60 F.3d at 637. "The standards for granting new trials are essentially the same" under both Rules 59 and 60. *Wharf*, 60 F.3d at 637 (citing *Jones v. AERO/CHEM Corp.*,

921 F.2d 875, 878, n.3 (9th Cir. 1990)). "A new trial is properly granted where a party can:

> (1) prove by clear and convincing evidence that the verdict was obtained through fraud, **misrepresentation, or other misconduct** [and]
>
> (2) establish that **the conduct complained of prevented the losing party from fully and fairly presenting his case or defense**."

Wharf, 60 F.3d at 637 (citing *Jones*, 921 F.2d at 878-879)(**emphases added**).

"[F]airness to parties and the need for a fair trial are important not only in criminal but also in civil proceedings, both of which require due process." *Bird v. Glacier Electric Coop.*, 255 F.3d 1136, 1151 (9th Cir. 2000). Where the "integrity or fundamental fairness of the proceedings in the trial court is called into serious question," the Ninth Circuit has pronounced that it "will review for plain or fundamental error" whether conduct at trial "offended fundamental fairness and deprived [a party] of our Constitution's guarantee of due process." *Id.*, 255 F.3d at 1148.

III. ARGUMENT

A. Judgment as a Matter of Law is Warranted Because the Clear Weight of the Evidence Demonstrates that Defendant Officers Violated Clearly Established Law in Subduing and Taking Sheldon Haleck into Custody

While the facts assumed by the Ninth Circuit in deciding *Silva* are not controlling, the doctrine of law of the case is applicable to the legal determinations

made during an interlocutory appeal. *Ridgeway v. Montana High School Ass'n*, 858 F.2d 579, 587 (9th Cir. 1988). Absent (1) a clearly erroneous decision, (2) intervening controlling authority, or (3) substantially different evidence, a district court does not have discretion to decide legal issues contrary to an appellate decision. *Jeffries v. Wood*, 114 F.3d 1484, 1488-89 (9th Cir. 1997) (en banc) *overruled on other grounds* by *Lindh v. Murphy*, 521 U.S. 320 (1997).

The facts adduced at trial necessitate a finding that Defendant Officers' use of force violated clearly established law consistent with the disposition of the appellate court. As the Ninth Circuit concluded in *Silva*, the use of a Taser constitutes an "intermediate, significant level of force" that requires justification by a "strong government interest" compelling such a use of force. *Silva v. Chung*, 740 Fed.Appx. at 886 (citing *Bryan v. MacPherson*, 630 F.3d 805, 823 (9th Cir. 2010)). In no uncertain terms, "Officer Chung's use of his Taser violated clearly established law." *Id.* Similarly, pepper spray constitutes an intermediate level of force within this jurisdiction. *Id.* Reasonable officers should have been informed in 2015 that the use of pepper spray and Tasers on an individual who disobeys commands, is engaged in a non-violent misdemeanor, and poses no threat violates the Fourth Amendment. Here, at least two of the Defendant Officers, Defendants Chung and Critchlow, clearly testified to legally and factually wrong beliefs that the use of pepper spray is **not** an intermediate level

of force. This fundamentally flawed understanding of the applicable law was not disputed at trial.

The Ninth Circuit's decision relied upon the facts that no serious crime was at issue, Sheldon did not pose an immediate threat to himself or others, Sheldon was never told he was under arrest, and Sheldon never actively attempted to evade arrest by flight. *Silva*, 740 Fed.Appx. at 887. At trial, multiple witnesses, including Defendant Officers, testified to facts consistent with the facts relied upon by the Ninth Circuit in *Silva*, including the number of times force was used, the type of force, and the circumstances surrounding each use. The prior decisions of the Ninth Circuit applicable to this case make it sufficiently clear that Defendant Officers' use of force violated clearly established law.

B. Judgment as a Matter of Law is Warranted Because the Clear Weight of the Evidence Demonstrates that Defendant Officers' Use of Multiple Instances of Intermediate Levels of Force was Objectively Unreasonable

Following the disposition of the Ninth Circuit Court, the central remaining issue in determining Plaintiff's Section 1983 claim was whether the Defendant Officers' use of force was objectively reasonable. The Supreme Court has established that "the reasonableness inquiry in an excessive force case is an objective one: The question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 1872 (1989). The Court identifies

three primary factors relevant to the reasonableness analysis that include "(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*, 490 U.S. at 396, 109 S.Ct. at 1872. "The most important factor under *Graham* is whether the **suspect** posed an immediate threat to the safety of officers or third parties." *Silva*, 740 Fed.Appx. at 886 (**emphasis added**) (internal quotations and citations omitted); *see, e.g., S.B. v. County of San Diego*, 864 F.3d 1010, 1013 (9th Cir. 2017). All of the facts and circumstances must be assessed, including "the availability of alternative methods of capturing or subduing a suspect." *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005).

Here, considering the evidence at trial and applying the *Graham* criteria to the material facts as shown by the undisputed evidence adduced at trial, Plaintiff demonstrated that Defendant Officers' repeated use of the intermediate level of forces were unjustifiable under the circumstances presented and therefore objectively unreasonable. On the evening of March 16, 2015, Sheldon was disrupting the flow of traffic on King Street. Defendant Officers Chung and Critchlow were dispatched to the scene with knowledge that a man wearing dark clothing was walking back and forth in the street. Within less than two minutes from the initial dispatch call, two officers were on scene and deployed pepper

spray directly at Sheldon's face after failed attempts to grab him. When Sheldon did not respond as the officers expected, they deployed more pepper spray. Still not achieving the desired result, Defendant Officer Chung deployed his Taser at Sheldon's chest as Sheldon repeatedly stated "I'm sorry, I'll listen" with both hands up, but nevertheless remained in the street. Sheldon did not have a weapon, and Defendant Officer Chung testified that at no point did Sheldon threaten him, attempt to harm him, or otherwise present any threat to his safety.

Defendant Officer Kardash, the third officer on the scene, arrived and Sheldon was again pepper sprayed, totaling upwards of twelve uses of pepper spray. Defendant Officer Chung then deployed his Taser at Sheldon's back initiating a five second pulse of electricity. Waiting only one second between pulses, Defendant Officer Chung activated the Taser again causing another five second pulse of electricity and Sheldon eventually fell to the ground consistent with the known effects of a Taser deployed in dart-mode. This entire encounter occurred within a four-minute span, during which Sheldon never attempted to flee the area. Sheldon was not told he was under arrest at any point, and at most he had committed the petty misdemeanor offense of disorderly conduct.

In determining reasonableness, the single most important factor is "whether **the suspect** posed an immediate threat." *Silva*, 740 Fed.Appx at 886 (**emphasis added**) (internal quotations and citations omitted). There must be

objective factors that evidence the immediacy of the threat. *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010). The Ninth Circuit in *Bryan* stated:

> While Bryan's behavior created something of an unusual situation, this does not, by itself, justify the use of significant force. **A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury.** Rather, the objective facts must indicate that the suspect poses an immediate threat to the officer or a member of the public.

Id. (**emphasis added**).

In conducting the analysis under the *Graham* factors, it is the immediacy of the threat from the suspect that is to be considered. The facts of this case, at most, describe a scenario in which there was nothing more than the potential for danger, and that potential did not come from Sheldon himself. Defendant Officers could and should have simply blocked traffic – which they effectively did – to alleviate any potential threat posed by vehicles. *See Smith*, 394 F.3d at 701 ("In some cases, for example, the availability of alternative methods of capturing or subduing a suspect may be a factor to consider.").

Intermediate force "is the most severe force authorized short of deadly force." *Id.*, 394 F.3d at 702. There is simply no basis under the facts of this case as adduced at trial to justify Defendant Officers' initial use of intermediate force in the form of pepper spray and subsequent repeated uses of intermediate force, including more pepper spray and three Taser deployments, as objectively

reasonable under the circumstances. Accordingly, this Court can and should determine as a matter of law that the force used was unreasonable and violated the Fourth Amendment.

C. A New Trial Before a Different Judge is Warranted Insofar as the Cumulative Errors at Trial Were Fundamentally Unfair and Prejudicial

A new trial may be "based on a cumulation of events if multiple errors synergistically achieve the critical mass necessary to cast a shadow upon the integrity of the verdict." *Uniloc USA, Inc. v. Microsoft Corp.*, 640 F. Supp. 2d 150**,** 183 (D. R.I. 2009). "[C]umulative error in a civil trial may suffice to warrant a new trial even if each error standing alone may not be prejudicial." *Jerden v. Amstutz*, 430 F.3d 1231, 1241 (9th Cir. 2005); *see also United States v. Castaldi*, 547 F.3d 699, 705 (7th Cir. 2008)("In order for evidentiary rulings to amount to cumulative error, a defendant must show that multiple errors ultimately denied him a fundamentally fair trial."). Thus, where "it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done," a new trial may be granted. *Caldrello v. Mercedes Benz of North America, Inc.*, 488 F. Supp. 2d 129, 131 (D. Conn. 2007); *Montesano v. Patent Scaffolding Co.*, 213 F.Supp. 141, 144 (W.D. Pa 1962). "Any error of law, if prejudicial, is a good ground for a new trial." *Caldrello*, 488 F. Supp. 2d at 131 (quoting 11 Charles

Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* at § 2805).

Here, erroneous rulings from the very start of trial, the prejudicial limitations placed upon Plaintiff's key trial witnesses, Plaintiff's inability to inquire into the theories of his case or effectively cross-examine adverse witnesses, the final rendering of jury instructions, and misconduct by opposing counsel throughout trial warrant a new trial before a different judge. These errors include, but are not limited, to the following: the Court's limitation on the use of the term "homicide" at trial, the Court's granting of Defendant Officers' introduction and discussion of the highly controversial theory of "excited delirium syndrome" throughout trial; opposing counsel's violation of the Court's order on Plaintiff's motion *in limine* to bar evidence of Sheldon's prior misconduct in Defendant Officers' opening statement and other obstructive tactics utilized by opposing counsel during trial; limitations and attacks on the testimony of Irminne Van Dyken, MD; limitations on the examination and testimony of Plaintiff's police practices expert; erroneous jury instructions; and the series of other evidentiary rulings favoring Defendant Officers' presentation of their case to the overwhelming detriment and prejudice to the presentation of Plaintiff's case.

1. Limitation on the Use of the Term "Homicide"

From the outset, opposing counsel sought to constrain Plaintiff's ability to fully and fairly present his case by precluding Plaintiff's counsel's use of the term "homicide" at trial. This was quite baffling as the **only** joint trial exhibit that opposing counsel agreed to was Sheldon's death certificate. *See* Exhibit 1 attached hereto. However, opposing counsel reneged on this agreement when it became apparent to opposing counsel that Plaintiff intended to place the death certificate and the conclusion by Dr. Christopher Happy, the Medical Examiner for the City and County of Honolulu, that the manner of Sheldon's death was "homicide" squarely before the jury in Plaintiff's opening statement. The Court – demonstrating its bias and prejudice from the outset – was complicit in constraining Plaintiff's ability to fully and fairly present his case when it asserted vociferously that the terms "homicide" would not be permitted to be used freely at trial – even though this was a term clearly and plainly in Sheldon's death certificate, an official business record, and the term used by the only individual who conducted the **actual** examination of Sheldon following his death and was uniquely qualified as the only board-certified forensic pathologist to diagnose and determine Sheldon's cause of death.

2. Allowing Testimony on the Highly Controversial, Disputed Theory of "Excited Delirium Syndrome"

In contrast to limiting of the use of the term "homicide," opposing counsel urged – over the objection of Plaintiff – that the highly disputed and unreliable theory of "excited delirium syndrome" be presented to the jury. The Court concurred with this request even though Plaintiff's First Motion *in Limine* to Exclude Testimony, Evidence, and Argument Regarding "Excited Delirium Syndrome" at Trial pointed out that Dr. Happy – again the **only** forensic pathologist in this case who was qualified to determine cause and manner of death – explicitly chose not to utilize the term "excited delirium syndrome" because it is not a recognized diagnosis and is a highly controversial "syndrome" in the medical community. *See* Dkt. No. 266 at p.2. The Court also concurred with bringing before the jury the controversial theory of "excited delirium syndrome" – in contrast to the exclusion of any use of the term "homicide" – when Defendant Officers' main proponent of "excited delirium syndrome" herself cited to literature that recognized that this syndrome is ill-defined, lacks clear diagnostic criteria, and is confused and overlaps with many other medical etiologies. *Id.* at p.3.

When Defendant Officers' expert witness, Dr. Stacey Hail, was permitted to testify on the controversial theory of "excited delirium syndrome" at trial, the Court did not allow Plaintiff to cross-examine Dr. Hail about things she referenced or reviewed in her report to reach her conclusions. In particular,

Plaintiff was not able to question Dr. Hail about: (1) Sheldon's Autopsy Report and the fact that Dr. Happy questioned the legitimacy of "excited delirium syndrome" as a real diagnosis; (2) Dr. Irminne Van Dyken's medical records, especially the records in which Dr. Van Dyken reported that she removed two Taser probes from Sheldon's back that were admitted into evidence at trial; (3) the photos of Sheldon's back with Taser wounds that also had already been admitted into evidence; (4) and Dr. Kyle Perry's notes describing "electrocution" by Taser even though Dr. Hail used those very terms in her expert report.

"Once expert testimony has been admitted, the rules of evidence then place 'the full burden of exploration of facts and assumptions underlying the testimony of an expert witness squarely on the shoulders of opposing counsel's cross-examination.'" *Ratliff v. Schiber Truck Co., Inc.*, 150 F.3d 949, 955 (8th Cir. 1998)(quoting *Newell Puerto Rico, Ltd. v. Rubbermaid, Inc.*, 20 F.3d 15, 20 (1st Cir. 1994). "It is thus the burden of opposing counsel to explore and expose any weaknesses in the underpinnings of the expert's opinon." *Ratliff*, 150 F.3d at 955 (quoting *Newell*, 20 F.3d at 21).

According to Dr. Hail's report she stated that she reviewed all of these documents – *ie.*, the autopsy report, autopsy photos, and all of Sheldon's medical records from the night of incident – to come to her conclusion that Sheldon was not Tased and did not die from Taser wounds, yet Plaintiff was prevented from cross-

examining Dr. Hail as to this information. *See* Exhibit 3 at pp.2-5, 12-13, & 24. By preventing Plaintiff's counsel form cross-examining Dr. Hail as to these documents, the Court essentially stripped Plaintiff of any of his abilities to be able to "explore and expose any weaknesses" in Dr. Hail's opinions that were already based upon the questionable theory of "excited delirium syndrome."

3. Violation of the Court's Order on Plaintiff's Motion *in Limine* by Opposing Counsel in Defendant Officers' Opening Statement and the Failure of Having the Proper Evidence in Court Despite Opposing Counsel's Representation of that Evidence's Availability

Following numerous pre-trial rulings[2] already demonstrating the Court's bias towards Defendant Officers, the beginning of trial did not start off well when opposing counsel, within the opening paragraph of her opening statement, deliberately violated the Court's orders on the Plaintiff's motion *in limine* to bar evidence of Sheldon's prior misconduct and stated that Sheldon had been in "four car accidents while intoxicated with methamphetamine" on the day before his encounter with Defendant Officers. Opposing counsel "corrected" this statement by referring to "multiple accidents" but the damage had already been done by revealing prejudicial information to the jury and foreclosing the

[2] Notwithstanding the discussion of the numerous instances of bias and prejudice in this memorandum, there are other instances where the Court's handling of other pre-trial and trial matters such as jury selection and the Court's different treatment of Plaintiff's and Defendant Officers' counsel demonstrate the Court's bias and prejudice. Plaintiff does not waive the discussion of these other instances of the Court's bias and prejudice on appeal.

opportunity for Plaintiff to effectively assert his objections as to the relevance of Sheldon being in accidents the previous day.

Another early "mistake" or "oversight" by opposing counsel during Plaintiff's presentation of his case was the failure to have all three Taser darts available on the first day of witnesses being examined. Even after opposing counsel had agreed that they would have the Taser darts present at trial during a meeting where all counsel were present to examine the Taser darts in opposing counsel's office, after representing in Court that those Taser darts would be present in the courtroom, and having three counsel of record and one supervising attorney present at the courtroom during trial along with the evidence specialist who was tasked with bringing the Taser darts to the courtroom, opposing counsel still did not have all the Taser darts in the courtroom when Plaintiff sought to have Defendant Officer Chung testify as to those Taser darts. The failure to bring the Taser darts to trial was either incompetence or a deliberate failure to hinder the pacing and flow of trial to the detriment of Plaintiff. In any event, this was but one of many instances of opposing counsel's tactics during trial that prejudiced Plaintiff in the presentation of his case.

4. Limitations Imposed on the Testimony of Irminne Van Dyken, MD

In Defendant Officers' Motion *in Limine* No. 13 to Exclude Queen's Medical Center Doctors and Nurses from Opining on the Cause of Death or the

Existence of Taser Probe Wounds or Marks, opposing counsel further revealed their willingness to engage in tactics to perpetrate a fraud on the Court and misrepresent the facts to the jury simply because those facts did not favor their case. Dkt. No.283. Just as Defendant Officers sought to minimize the impact of Dr. Happy's determination that the manner of death was "homicide," Defendant Officers' counsel sought to run away and cover up the damaging testimony that was in the very medical records that were disclosed early on to Defendant Officers regarding the treatment Sheldon received at the hospital – namely that Dr. Irminne Van Dyken identified "two small holes from tazer darts" in Sheldon's chest **and** removed two taser darts from Sheldon's back on the evening of March 16, 2015. *See* Exhibit 2 attached hereto at p.102. This information was critically important at trial because it was directly contrary to the factual information that was incorrectly noted in Dr. Happy's autopsy report that there was "[n]o evidence of Taser barb penetration of the skin" and perpetuated in **all** of Defendant Officers' experts' reports and opinions, even though these experts purportedly reviewed the Queen's Medical Records from the date of Sheldon's death that included Dr. Van Dyken's notes, diagnosis, and treatment plans. *Compare* Exhibit 3 at pp.12-13, Exhibit 4 at pp.20-21, 24, and Exhibit 5 at pp.19, 36-37, 39-41.

The significance of this information was not lost on the Court who throughout trial commented on whether the Taser darts even struck, contacted, and

penetrated Sheldon's body. Despite this knowledge and despite contrary authority cited to by Defendant Officers' counsel and sister courts in the Ninth Circuit that would have **permitted** Dr. Van Dyken to testify to personal observations, diagnosis, and treatment, the Court was complicit in limiting the ability of Plaintiff to fully examine Dr. Van Dyken as a witness. *See* Dkt. No. 304-1 at pp. 3-6, citing *Musser v. Gentiva Health Servs.*, 356 F.3d 751 (7th Cir. 2004) and *Mettias v. United States*, Civ. No. 12-00527, WL 998706 (D. Haw. March 6, 2015).

Moreover, when Dr. Van Dyken was allowed to testify at trial, Defendant Officers' counsel deployed underhanded tactics by continuing to make frivolous objections that the Court already had ruled on, preemptively accusing Plaintiff's counsel of improperly soliciting narrative and opinion testimony, improperly soliciting opinion testimony herself from Dr. Van Dyken and then objecting once the door had been opened to appropriate cross-examination by Plaintiff's counsel. On this last matter, despite Plaintiff's counsel's request that he be permitted to cross-examine Dr. Van Dyken and that the Court review the transcript of the examination by opposing counsel, the Court took the side of Defendant Officers and, in fact, issued a curative instruction – again over the objection of Plaintiff's counsel – attacking Dr. Van Dyken as merely a fact witness and not an expert.

5. Limitations on the Examination and Testimony of Richard Lichten, Plaintiff's Police Practices Expert

The limits placed on the examination and testimony of Richard Lichten, Plaintiff's police practices expert, further highlight the Court's bias and prejudice against Plaintiff and in favor of Defendant Officers. By not permitting Mr. Lichten to testify as to the objective reasonableness of Defendant Officers' conduct against the standards and expectations reasonable officers are trained on and expected to know and by foreclosing examination of Mr. Lichten's opinions about what the appropriate police practices are and what reasonable officers are trained to do when police believe a person they are encountering may be emotionally disturbed, mentally deranged or under the influence of drugs, the Court unfairly prevented Plaintiff from fully presenting his case.

Defendant Officers' primary objection to the opinions of Mr. Lichten in their Motion *in Limine* No. 1 to exclude his expert opinions was his "references to what 'reasonable officers' would know, would have concluded, or would have done." Dkt. No. 271-1 at p.13. In its Order #2 on Defendants' Motions *in Limine,* the Court ruled with respect to this objection, "Mr. Lichten also may not testify as to the **ultimate legal conclusion as to whether an individual Defendant Officer used excessive force in violation of the Fourth Amendment** to the United States Constitution." Dkt. No. 352 at pp.3-4 (**emphasis added**).

At trial, during the critical moment when Mr. Lichten was providing his opinions, opposing counsel interrupted Mr. Lichten with a speaking objection about invading the province of the jury rather than requesting a sidebar as the Court had indicated would be its practice. During the sidebar colloquy, it became apparent that the primary thrust of Defendant Officers' counsel's objection was the use of the term "reasonable" and that Mr. Lichten was somehow giving his opinion as to the ultimate issue of law which, as stated in the Court's order, was "whether an individual Defendant Officer used **excessive force in violation of the Fourth Amendment**." Defendant Officers' counsel also purported that their police practices expert would not use the word "reasonableness" and that his report does not opine as to this ultimate issue of law. This is factually untrue insofar as Mr. Peters' report opines that

> "Officers are taught that the **national standard** regarding the use of deadly and non-deadly force that amounts to a 4th Amendment seizure **is one of objectively unreasonable force**, under the United State Constitution's Fourth Amendment, based upon the totality of the circumstances known to the officer at the moment the force was used.
>
> Officers are taught, among other things, '**reasonableness** contemplates careful consideration of the facts and circumstances of the incident including: (1) the severity of the crime at issue, (2) whether the person poses an immediate threat to the safety of officers or other, and (3) whether the person is actively resisting arrest or attempting to evade arrest by flight.' As a national use-of-force Instructor-Trainer coupled with my experience, education, and training, I concluded the force used on Mr. Haleck by Officers Chung, Critchlow, and

> Kardash was consistent with and did not violate **national use-of-force standards**, training, and recommendations based upon the totality of the circumstances known to them at that time."

See Exhibit 5 at p.11 (**emphases added**).

What becomes apparent is that Defendant Officers' police practices expert uses the terms "national standard" or "national use-of-force standards" as a code word for "objectively unreasonable" and this word choice is somehow acceptable because it does not use the legal terminology that is found in case law and is somehow not testimony as to the "ultimate issue of law." The appropriate remedy for this, however, is not to just use coded words that are, potentially, even more confusing to the jury, but for the Court to appropriately instruct the jury as to the definitions of terms like "objective reasonableness" or "intermediate level of force" as these terms relate to excessive force before the jury begins its deliberations. As discussed, *infra*, this was not done, further compounding the error that Mr. Lichten was not able to discuss his police practices opinions simply because they were couched in terms of what objectively reasonable officers should have known and taken into consideration based upon their training and the totality of the circumstances they encountered.

Lastly, Defendant Officers' counsel argued and the Court accepted the arguments that Mr. Lichten could not testify as to police practices when police encounter individuals whom they believe may be emotionally disturbed, mentally

deranged, mentally disabled, or under the influence of drugs. Opposing counsel attempted to shoehorn these opinions into an assertion that Plaintiff was bringing an American with Disabilities Act claim that Plaintiff readily conceded he had not brought as part of their claims against Defendant Officers.

What Defendant Officers' counsel failed to understand or what they deliberately ignored is that under relevant excessive force case law, an officer's specific knowledge of a person's mental illness diagnosis is not needed for this factor to be considered in the determination of whether the force used was excessive or not. For example, in *Bryan v. MacPherson*, 608 F.3d 614 (9th Cir. 2010), Officer MacPherson confronted an individual who he "believed…may have been mentally ill" and "who was yelling gibberish and gave no sign of hearing or understanding Officer MacPherson." *Bryan*, 608 F.3d at 625. In considering whether the use of force in this instance was appropriate, the Ninth Circuit in *Bryan* took into consideration the officer's belief that the person seized was mentally ill or mentally disturbed and determined that this *Graham* factor did not support deployment of an intermediate level of force. *Id.*, 608 F.3d at 625-626. *See also Glenn v. Washington County*, 673 F.3d 864, 875-876 (9th Cir. 2011)(Court considers "whether the officers were or should have been aware that [individual] was emotionally disturbed" in its evaluation of a Fourth Amendment excessive force claim involving an intoxicated and suicidal teenager); and *Deorle v.*

Rutherford, 272 F.3d 1272, 1285 (9th Cir. 2001)(in a case where police were called by family members to assist with a man who was intoxicated and behaving erratically, the Court concluded that "[e]very police officer should know that it is objectively unreasonable to shoot…an unarmed man who: has committed no serious offense, **is mentally or emotionally disturbed**, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and present no objectively reasonable threat to the safety of the officer or other individuals").

Similarly, Mr. Lichten should have been able to opine on what reasonable officers are trained to do when they believe they are encountering someone who is mentally ill, emotionally disturbed, or mentally deranged. This did not happen here – and Plaintiff was not able to make his presentation of this key factor to the jury for its weighing of the *Graham* factors for them to determine whether Defendant Officers used excessive force or not in the case of Sheldon.

6. <u>The Court's Jury Instructions Incorrectly Stated the Law, Omitted Key Instructions, and Misled the Jury to the Extent that Plaintiff was Unable to Fully and Fairly Present His Case to the Jury</u>

Trial instructions must fairly and adequately cover issues presented, correctly state the law, and not be misleading. *Floyd v. Laws*, 929 F.2d 1390, 1394 (9th Cir. 1991). "In a civil trial, erroneous instructions 'need only be more probably than not, harmless.'" *Floyd*, 929 F.2d at 1394 (quoting *Frank Briscoe,*

Co., Inc. v. Clark County, 857 F.2d 606, 612 (9th Cir. 1988)). However, "cumulative error in a civil trial may suffice to warrant a new trial even if each error standing alone may not be prejudicial." *Jerden*, 430 F.3d at 1241. Thus, taken as a whole, numerous errors permeated the Court's final jury instructions such that the cumulative effect was that the jury instructions plainly resulted in preventing Plaintiff from fully and presenting his case to the jury. These erroneous jury instructions and rulings included the following: (1) confusing and extraneous language in the Use of Force instruction; (2) an incomplete excessive force instruction that removed important factors from amongst the totality of the circumstances that the jury should have considered in determining the objective reasonableness of Defendant Officers' use of force; (3) omission of instructions on central legal principles such as "intermediate level of force," "misdemeanor offenses," "eggshell plaintiff rule," and "homicide"; (4) omission of an instruction about punitive damages; and (5) inclusion of virtually all of Defendant Officers' requested special instructions in comparison to the exclusion of all of Plaintiff's requested special instructions.

a. Misleading Jury Instructions

In its Jury Instruction No. 12 related to Unreasonable Seizure of a Person Generally, the Court included extraneous language about the intentionality of Defendant Officers' actions and introduced confusing and misleading directives

such as "it is not enough if the plaintiff only proves that the defendant acted negligently, accidentally, or inadvertently in conducting the seizure." *See* Dkt. No. 370 at pp. 14-15. This confusing and misleading language was recommended by Defendant Officers, *see* Dkt. No. 332 at p.9, and was ultimately adopted over Plaintiff's counsel's objection that the intentional application of force, *ie.* the deliberate use of pepper spray and the Taser by Defendant Officers, was never in dispute. This instruction was also adopted disregarding the cautionary Ninth Circuit Jury Instructions Committee's recommendation in its Comments to Model Jury Instruction No. 9.20 that "[i]f the court is able to determine as a matter of law that the plaintiff was seized, the Committee recommends the court instruct the jury accordingly and omit the portions of this instruction that define a seizure." *See Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit*, Ninth Circuit Jury Instructions Committee, 2017 Edition (last updated June 2019), available at http://www3.ce9.uscourts.gov/juryinstructions/sites/default/files/WPD/Civil_Instructions_2019_6.pdf (last accessed July 5, 2019) (hereinafter "*Manual of 9th Circuit Model Civil Jury Instructions*").

b. Incomplete and Incorrect Jury Instructions

In its Jury Instruction No. 13 related to Unreasonable Seizure of a Person—Excessive (Deadly and Nondeadly) Force, the Court removed for the jury's deliberations the *Graham* factor of "whether it should have been apparent to

the officers that the person they used force against was emotionally disturbed" over the request of Plaintiff for this instruction and in favor of Defendant Officers' request to omit this factor. *Compare* Dkt. No. 370 at p.17 *with* Dkt. Nos. 333 at p.6-6 and 332 at pp.5-6. *Compare also with* Jury Instruction No. 9.25, *Manual of 9th Circuit Model Civil Jury Instructions* at p.185. The complete omission of this factor from the excessive force jury instruction was a material error in the Court's rendering of its jury instructions, compounding the Court's earlier prejudicial and misguided ruling that Plaintiff's counsel could not inquire into the issue of Sheldon's apparently disturbed state that Defendant Officers Critchlow and Kardash recognized and noted as being "mentally deranged" in their subsequent police reports. The issuance of this incomplete and incorrect jury instruction is contrary to the plethora of Ninth Circuit caselaw that properly instructs that this factor should be considered by the fact-finders in determining whether force used by police officers is excessive. *See Bryan*, 608 F.3d at 625-626, *Glenn*,673 F.3d at 875-876, and *Deorle*, 272 F.3d at 1285.

c. Omitted Jury Instructions

The Court omitted multiple instructions submitted by Plaintiff from its final jury instructions. These omissions included instructions on intermediate level of force, failure to comply not active resistance, misdemeanor offenses, homicide, and punitive damages—all of which were based upon and consistent with either

Ninth Circuit caselaw, well-established legal principles, or in learned treatises as related to the definition of "homicide." *See* Dkt. No. 333 at pp. 18-21, & 27-30. These omissions stand in sharp contrast to the inclusion of Defendant Officers' requested special instructions about the availability of less intrusive means and the role of police policies and training materials that were similarly based upon Ninth Circuit caselaw.

By failing to provide correct statements of the applicable law for the concepts of intermediate level of force, failing to comply with an officer's orders not amounting to active resistance, or misdemeanor offenses, the Court only further compounded its earlier rulings that prohibited Plaintiff's counsel from having Mr. Lichten, Plaintiff's police practices expert, opine on these concepts and how an objectively reasonable officer would have known of, been trained in, and have been expected to utilize these concepts in the weighing of his or her decisions to use particular levels of force. *See* discussion *supra*.

The Court's written order forming the basis of the Court's oral ruling granting Defendant Officers' Rule 50(a) motion with respect to punitive damages essentially highlights the biased view the Court harbored toward the evidence presented at trial and demonstrates that the Court was unable and almost unwilling to acknowledge the disputes between facts that were presented at trial. For example, in discussing Defendant Officers' testimony, the Court did not

acknowledge the testimony at trial that Defendant Officer Kardash had noted his observations that Sheldon was "mentally deranged" or that Defendant Officers Chung and Critchlow had both admitted to their belief that the use of pepper spray was "below" intermediate levels of force and, thus, clearly an incorrect understanding of the level of force that they were dealing with when they deployed their pepper spray and inconsistent with "national" legal standards. Dkt. No. 377 at p.7. As another example, in discussing Dr. Happy's testimony, the Court did not acknowledge the possibility that Dr. Happy could have been wrong in his assessment that there was no evidence of the Taser dart probes actually striking Sheldon or that, at trial, Dr. Happy testified that the interaction with the Defendant Officers that night was a "significant factor in what led up to [Sheldon's] death." This one-sided view of the evidence simply underscores the Court's prejudicial and biased view toward the evidence and explains why the Court to rejected Plaintiff's proposed punitive damages instructions.

7. Series of Evidentiary Rulings Favored Defendant Officers' Presentation of their Case to the Overwhelming Detriment of Plaintiff's Presentation of His Case

Evidentiary errors that "affect the substantial rights" of a party warrant reversal and, thus, support a motion for a new trial. *See Jerden v. Amstutz, M.D.*, 430 F.3d 1231, 1240 (9th Cir. 2005). In addition to the evidentiary rulings discussed above, during trial there were numerous other rulings and multiple errors

that – taken cumulatively – affected the substantial rights of Plaintiff, ultimately denied Plaintiff a fundamentally fair trial, and warrant the granting of a new trial before a different judge. *Jerden*, 430 F.3d at 1241; *U.S. v. Castaldi*, 547 F.3d at 705.

These rulings included: (1) the way the Court treated Plaintiff's counsel and opposing counsel differently such as allowing witnesses to provide narrative answers when opposing counsel conducted their examination or allowing abusive, disruptive, speaking objections by opposing counsel in violation of the Court's own rules without correction versus the consistent chastising of Plaintiff's counsel; (2) the curtailing of Plaintiff's counsel's line of questioning prematurely without allowing Plaintiff to properly examine witnesses, including expert witnesses; (3) preclusion of Plaintiff's counsel proper use of a demonstrative aid during closing arguments based on objections by opposing counsel based on testimony and exhibits that were either never elicited, presented, or admitted at trial; and (4) the Court's complicity in excluding the presence of Sheldon's parents and wife during a public trial under the guise and pretext asserted by opposing counsel that the witness exclusionary rule was necessary to enforce.

Examples of the premature curtailing of Plaintiff's counsel's line of questioning included the curtailing of cross-examination of Dr. Hail as discussed *supra* and the Court's preclusion of Taser training materials or instructional

warnings without even giving Plaintiff's counsel the opportunity to establish that said training material were those seen and used by Defendant Officers, especially Defendant Officer Chung, who had in his deposition testified that he annually participated in the Taser training provided by the Honolulu Police Department.

The preclusion of Plaintiff's counsel's use of a demonstrative aid during closing arguments was improper and another clear demonstration of the Court's bias and prejudice in favor of Defendant Officers. Closing arguments must be limited to the evidence and the inferences that can reasonably be drawn from the evidence. *United States v. Eagle*, 515 F.3d 794, 805 (8th Cir. 2008). Plaintiff's proposed timeline to be used by Plaintiff's counsel in his closing arguments drew from the testimony of witnesses at trial and could only be completed after the close of evidence and after the oral testimony of witnesses could be reviewed to get an accurate timeline. *See* Exhibit 7. Despite Plaintiff's counsel's willingness to review this testimony with the Court and opposing counsel, the Court once again ruled in favor of Defendant Officers after apparently giving more weight to Defendant Officers' objections that were based on testimony from Mark Kroll or EMS reports that were either never elicited, presented, or admitted at trial. *See* Exhibit 6 attached hereto.

Lastly, of all the rulings throughout the trial, perhaps the most egregious and cruel ruling was the Court's invoking of the witness exclusionary

rule to exclude the parents and wife of Sheldon from being present during trial for virtually all of the presentation of the evidence and examination of the majority of the witnesses. From the outset Plaintiff acknowledged that the initial imposition of the witness exclusionary rule was proper but asserted that following their testimony, the parents and Sheldon's wife should have been permitted to be present at the trial. Under the pretext of perhaps needing to call them as rebuttal witnesses, opposing counsel persisted to invoke the benefits of the exclusionary rule. Although Plaintiff's counsel urged different ways to address these concerns and even predicted to the Court the very thing that happened which was that opposing counsel would eventually not choose to call or recall Sheldon's parents or wife as witnesses, the Court did not press opposing counsel on the issue of the witness exclusionary rule as the Court pressed Plaintiff's counsel to accept her rulings which typically weighed against Plaintiff's interests.

V. CONCLUSION

For the foregoing reasons, Plaintiff requests this Court grant Plaintiff's renewed motion for judgment as a matter of law or, in the alternative, motion for a new trial before a different judge.

DATED: Honolulu, Hawaii, July 5, 2019.

/s/ Eric A. Seitz
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